No. 2967.

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

NATIONAL SURETY COMPANY, a corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA J. HAYS, his wife; T. F. MENTZER and ELIZABETH E. MENTZER, his wife; A. D. CAMPBELL and JESSIE E. CAMPBELL, his wife; DAVID COPPING and EVA COPPING, his wife,
Defendants in Error.

Brief of Plaintiff in Error

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Metropolitan Press, Seattle

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STATEMENT OF THE CASE.

The Plaintiff in Error, National Surety Company, is a corporation, incorporated under the laws of the State of New York, and a citizen and resident of that State, and during all the times in the proceedings mentioned, was and still is lawfully engaged in the Surety business in the State of Washington and qualified to maintain this action (T. of R. pg. 75).

The defendants in error at all times were and

still are citizens and residents of the State of Washington.

The State Bank of Tenino, hereafter called the Bank, at all times mentioned, was a State Bank of the State of Washington, located at Tenino, Thurston County, Washington, with a capital stock of $10,000.00 divided into 100 shares. The defendants in error owned stock in the Bank as follows: Blumauer, 11 shares; Mentzer, 5 shares; Copping, 10 shares; Campbell, 10 shares; Hays, 51 shares; thus owning all except 12 shares of the capital stock of the Bank (T. of R. pg. 70). The minutes of the stockholders' meetings of the Bank show that Blumauer was at all times President; Hays, Cashier; Mentzer, Vice-President and Director, and Campbell Assistant Cashier and Director (T. of R. pg. 71).

Defendants, T. F. Mentzer and Elizabeth E. Mentzer are husband and wife; A. D. Campbell and Jessie E. Campbell are husband and wife, and at the time suit was brought defendants, David Copping and Eva Copping were husband and wife. Since that time, however, David Copping died, but before his death he had conveyed to his wife, Eva Copping, all of his property, all of which was their community property. Defendants, Blumauer, Hays and Hays' wife made default in the action. The contesting defendants being

Mentzer and wife, Mrs. Eva Copping and Campbell and wife.

Shortly prior to June 22, 1911, the Bank desiring to become a depositary of public funds of Thurston County, Washington, made application to the plaintiff to become surety for it on the bond required by the laws of the State of Washington, to be taken by the County Treasurer to secure bank deposits of County funds.

The application for the bond is defendant's Exhibit "A" (T. of R. pg. 125). It shows an application for a $5,000.00 bond to be dated June 22, 1911, the obligee to be "Treasurer, Thurston County, Wash." That the officers of the Bank who give personal attention to its business are Isaac Blumauer, President; T. F. Mentzer, Vice-President, and W. Dean Hays, Cashier. The application states that the Bank "will at *all times* indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, and liabilities, etc., of every kind and nature" (T. of R. pg. 127). This application was made by authority of the Board of Directors of the Bank, consisting of Blumauer, Mentzer, Campbell and Hays (T. of R. pg. 129).

At the time of the execution of the bond so applied for plaintiff demanded to be indemnified by the

personal obligation of the defendants who were stockholders, officers and directors of the Bank (T. of R. pg. 58) and pursuant thereto, plaintiff as surety for the bank executed the bond—plaintiff's Exhibit 1 (T. of R. pg. 87 and fol.) and the defendants executed and delivered the indemnity agreement—plaintiff's exhibit 2 (T. of R. pg. 96 and fol.).

The bond (T. of R. pg. 87 and fol.) binds the Bank as principal and plaintiff as surety unto Robert Marr individually, and as County Treasurer of the County of Thurston, State of Washington, in the sum of $5,000.00.

It recites among other things the following: "THE CONDITION OF THIS OBLIGATION IS SUCH, that, whereas the said Robert Marr has been elected and has qualified as Treasurer of Thurston County, State of Washington, and as such Treasurer, at the special instance and request of the said State Bank of Tenino, has deposited, or may hereafter, from time to time, deposit with, and place in charge of the said principal hereinbefore named, certain moneys, checks, etc., for the custody or for the proceeds of the face value of which the said Treasurer as such, may be responsible." The Bond covenants to pay the Treasurer, upon his check, for all deposits with certain other covenants and conditions set forth

in the Bond. The Bond is dated June 22, 1911, and is executed on behalf of the Bank by Blumauer, President, and Hays, Cashier.

The indemnity agreement recites among other things that the signers have *requested* the plaintiff to execute a Bond in the sum of $5,000.00 in behalf of the Bank, in favor of the *Treasurer* of Thurston County, Washington, effective June 22, 1911, covering deposits of the Treasurer in said Bank, and further recites that, whereas the plaintiff is about to execute such Bond upon the security and indemnity hereby and herein provided,

NOW, THEREFORE, in consideration of the premises and the sum of One Dollar, the signers covenant and agree with the plaintiff as follows:

FIRST. To pay an annual premium of $25.00 for the *accommodation* afforded the signers until the plaintiff shall have been fully discharged from liability on said instrument and on matters arising therefrom and *until* there shall have been furnished to the plaintiff at its principal office in the City of New York, proof of such discharge;

SECOND. The signers were to at all times indemnify and keep indemnified the plaintiff and save it harmless from all liability which it shall at any time

incur in consequence of having executed the Bond, and if claims were made, which in the judgment of the plaintiff, should be paid the signers agreed on demand to pay the same, would defend all suits brought by claimants against the plaintiff, or the plaintiff could defend, they paying the costs and attorney's fees, to pay any judgments, the plaintiff's vouchers for any payments to be prima facie evidence of the fact and the amount of the signers' liability;

FOURTH. The plaintiff may at any time take steps to be released from liability under said bond, or *under any other instrument* within the meaning of Section Fifth hereof;

"FIFTH. That no act or omission of the Company in modifying, amending, limiting or extending the instrument so executed by the Company shall in any wise affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the Company may alter, change, or modify, amend, limit or extend said instrument and may execute renewal thereof or other and new obligation in its place or in lieu thereof, and without notice to us, notice being expressly waived, and in any such case we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended,

limited or extended instrument, or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein."

SEVENTH. The indemnity agreement binds not only the signers jointly and severally, but their heirs, executors, administrators, and assigns *"until the Company shall have executed a release under its corporate seal, attested by the signatures of its officers proper for the purpose."*

EIGHTH. The covenants shall be available to the plaintiff as well concerning any or all former or subsequent bonds or undertakings executed for them or at the instance of any of them as concerning the original Bond.

The indemnity agreement is dated June 22, 1911, and signed by all the defendants together with the Bank, signing through its President, Blumauer, and its Cashier, Hays.

The Statute of the State of Washington, regarding the depositary for County funds is found in Session Laws 1907, page 74, and following, and it provides that the several County Treasurers of the State of Washington shall annually in January, designate one or more Banks in the State as depositaries of pub-

lic funds held or required to be kept by such Treasurers. Such designation to be in writing and filed with the Board of County Commissioners of the County, and no County Treasurer shall deposit public moneys in any Bank except as provided in the Statute. Upon such designation the Bank is to file a surety bond with the Clerk of the County, conditioned for the prompt and faithful payment of checks drawn by the Treasurer. The Bond is to be approved by certain County Officials. The Treasurer is to deposit, in such depositary Banks, County moneys under his official control, and for the purpose of quarterly settlements and counting the funds in the Treasurer's hands, such deposits shall be deemed to be in the County Treasury. The indemnity agreement nowhere names the Treasurer but only speaks of the Treasurer of Thurston County.

When the depositary bond and indemnity agreement were delivered the $25.00 premium was paid to the plaintiff. Robert Marr's term as Treasurer for which he had been elected would expire on January 8, 1913.

Prior to June 22, 1912, when the first year of the bond would expire for which the annual premium had been paid, the Bank acting through indemnitor, Hays, paid plaintiff $25.00 as and for a second year's pre-

mium on the bond, continuing the bond until June 22, 1913. The plaintiff's receipt therefor, dated June 22, 1912, was filed with the County Clerk and attached to the bond (T. of R. pg. 55). With this receipt the Bank wrote to Treasurer Marr as follows:

"June 7, 1912.

Hon. Robert Marr, Treasurer, Olympia, Washington. Enclosed herewith is letter from National Surety Company in re, $5,000 depository bond which indicates that same is continuous upon payment of the premium which we have this day remitted. But if there is any further evidence on the payment we will be glad to furnish it. With kind personal regards, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, V.-President."

(T. of R. pg. 56).

As above stated, Robert Marr's term as County Treasurer expired January 8, 1913, and on that date W. H. Britt succeeded him in office, and the bond thus extended would run over into his term to June 22, 1913.

Prior to June 22, 1913, when the second year of the bond would expire for which the annual premium had been paid the Bank acting through indemnitor Hays, paid the plaintiff $25.00 as and for a third year's premium, extending the bond to June 22, 1914. The plaintiff's receipt therefor, dated June 22, 1913, was

filed with the County Clerk and attached to the bond (T. of R. pgs. 56-57). With this receipt the Bank wrote to Treasurer Britt, successor in office to Treasurer Marr, as follows:

"June 13, 1913.

Mr. W. H. Britt, County Treasurer,
Olympia, Washington.

Dear Sir: Enclosed please find herewith receipt for premium on bond No. 596,617, National Surety Company for $5,000 which expires on June 22, which continues same in force for one year. Thanking you to acknowledge receipt of the same, I am

Very truly yours,
W. DEAN HAYS, Cashier."
(T. of R. pg. 57.)

It appears that the receipt, dated June 22, 1911, above mentioned, was lost and there was filed with the County Clerk a duplicate receipt with a letter from the plaintiff, acting through its Agency Secretary, Mr. Welch, to Mr. Hays as Cashier of the Bank, which letter reads as follows:

"January 24, 1913.

Dear Sir: Acknowledging your esteemed favor of the 20th inst. herewith duplicate receipt which renews your depository bond in favor of Treasurer of Thurston County, Washington, from June 22, 1912, until June 22nd, 1913. Trusting this is satisfactory, and with kindest regards, I am

Yours very truly,
EDW. P. WELCH, Secy."
(T. of R. pgs. 57-58.)

This was after Britt had taken office.

Prior to June, 1914, when the third year of the bond would expire for which the annual premium had been paid, the plaintiff billed the bank for the ensuing year's premium extending the bond to June 22, 1915. The Bank, acting through indemnitor Hays, paid the premium and the following correspondence took place between the Bank, the plaintiff, and Treasurer Britt:

"Tenino, Washington, May 22, 1914.

George W. Allen & Co.,
Alaska Bldg.,
Seattle, Washington:

My Dear George:

Enclosed herewith is a draft for $25.00 in payment for renewal of depositary bond.

In this connection I desire to state that our county treasurer is Mr. W. H. Britt who succeeded Robert Marr, and if necessary please make an endorsement to that effect.

Thanking you for your attention in this matter, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, V.-President."
(T, of R. pg. 106.)

"Tenino, Washington, May 25, 1914.

George W. Allen & Co.,
Alaska Bldg.,
Seattle, Washington.

My Dear George:

Your favor the 23rd inst. enclosing receipt for annual premium has been received and in connection

therewith beg to state that Mr. W. H. Britt was elected to succeed Mr. Robert Marr at the election two years ago, hence I imagine that it is necessary for you to issue a new bond, which I trust you will do and forward to us, the same bond has been renewed once or twice since Mr. Britt assumed office.

Thanking you for your attention in this matter, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, V.-President."
(T. of R. pg. 107.)

"May 26, 1914.

Mr. W. Dean Hays, Vice President,
State Bank of Tenino,
Tenino, Washington.

My Dear Dean:

Acknowledging your esteemed favor of the 25th instant, we enclose herewith new bond duly executed in favor of W. H. Britt, County Treasurer of Thurston County, Washington, effective June 22d, 1914. We think it best that a new bond be filed as of the anniversary date of the former bond, and we will, therefore, require new application signed by your good institution, which kindly let us have, together with copy of your latest financial statement, by return mail. It will also be necessary that the enclosed release be signed by the Treasurer covering the former bond, as the same by its terms is continuous, and we must have this release to enable our home office to relieve our account of future premiums.

Thanking you to let us have the application and release promptly, and with kindest regards, I remain,

Very truly yours,
GEO. W. ALLEN,
Manager."

GWA. RW.

(T. of R. pg. 108.)

"Olympia, Washington, May, 26/14.

State Bank,
Tenino, Wash.

Gentlemen:

I just received renewal certificate from National Surety Company, which runs to Robt. Marr, which should not be so. I am of the opinion, that, as the bond is made to Robt. Marr as County Treasurer, it would be much better to have a new bond made in my name as County Treasurer.

Please take this matter up at once and have the change made as soon as possible.

I return the Certificate just received herewith.

Yours truly,
W. H. BRITT."
(T. of R. pg. 110.)

"May 29, 1914.

Mr. W. H. Britt, Treas.,
Olympia, Wash.

My Dear Mr. Britt:

You will herewith please find Depository Bond of the National Surety Company of New York in your favor for $5000.00 maturing June 22, 1915, *to take the place of* the one heretofore issued to Robert Marr as Treasurer.

You will also find two blank releases for the former bond which you will kindly sign and return to us.

Thanking you for your attention to this matter and trusting that you will find everything satisfactory, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays, President."
(T. of R. pg. 111.)

As a result of this correspondence a depositary bond, dated June 22, 1914, was *substituted* for the original depositary bond, dated June 22, 1911. This bond is Exhibit 10 and appears in the Transcript of Record, page 112 and following. See also Transcript of Record, page 61 and following.

When this bond was substituted the original bond was released, and Treasurer Britt executed and delivered to plaintiff a release to be effective June 22, 1914, the date the substituted bond would become operative. This release is Exhibit 11, and appears in Transcript of Record, page 116 as follows:

"National Surety Company,
New York.

Gentlemen:

As surety on that certain depository bond, dated June 22d, 1911, in behalf of the State Bank of Tenino, in favor of Robert Marr, Treasurer, Thurston County, Washington, in the penalty of $5,000, you are released from further liability thereunder, from and after the 22d day of June, 1914.

W. H. BRITT,
Treasurer, Thurston County, Wn."

Plaintiff was prevented by the Court on defendants' objection from explaining the above transaction by which the original bond was released and the bond of June 22, 1914, substituted therefor. The purpose of such testimony, among other things, going to show

that otherwise there would be two bonds when only one was desired.

Plaintiff asked Witness Allen, its general agent for Western Washington, the purpose of making the release become effective on June 22, 1914, but was not permitted by the Court to answer over the objection of defendants. He was also asked the purpose of obtaining the release of the original bond when substituting the bond of June 22, 1914. This was also refused by the Court on defendants' objection. He was also asked if there was any period between the release of the original bond and the coming into effect of the substituted bond during which time the plaintiff would not have been bound. He answered "No sir, I ————" and was interrupted by the objection of the defendants which was sustained by the Court. Plaintiff then stated that it desired to show by the witness that one bond was a substitution for the other. The Court sustained the objection and stated: Court— "It seems that everybody in the room is about as well qualified to answer the question as he is. It all seems to be in writing."

Plaintiff was allowed exceptions to the foregoing adverse rulings, and it all appears in the Transcript of Record on pages 62 and 63, and in the Assignment of Errors on page 140.

During all the time above mentioned the Indemnity Agreement given by the defendants to the plaintiff, at the time the original bond of June 22, 1911, was executed was in plaintiff's possession in its home office in New York. No new or other indemnity agreement was given and the indemnity agreement was never released or surrendered (T. of R. pg. 63).

Preceding the giving of the bond on June 22, 1911, the Bank made application for the same on a form furnished by the plaintiff and the same is true of the substituted bond of June 22, 1914 (Exhibits "A" and "B," T. of R. pgs. 64, 125 and following). Such applications are made by a Bank seeking a Depositary Bond for the purpose of giving the Surety Company information in connection with the application and the details of the bond applied for.

The Indemnity Agreement is signed by the applicant Bank with other signers indemnifying the Surety Company against the loss on the bond (T. of R. pg. 65).

Plaintiff offered to show that it is the universal rule to require applications for a bond from the applicant Bank. This offer on defendant's objection was refused by the Court, with exception to plaintiff (T. of R. pg. 64; Assignment of Errors, pg. 140).

During the fourth year and less than three months after the substituted bond of June 22, 1914, had been given, to-wit, on September 17, 1914, the Bank closed its doors, and R. A. Langley was appointed by the Court as receiver of the Bank.

The Bank's books produced by Receiver Langley, show as follows: Treasurer Marr as County Treasurer of Thurston County, opened an account with the Bank on June 20, 1911, and closed it on January 8, 1913, the day his term of office expired and Treasurer Britt succeeded him (T. of R. pg. 67). His account (Exhibit 16, T. of R. pg. 121), shows checks and deposits, his balance varying from $9,000 to $15,000, his balance on January 8, 1913, being $9,974.76.

Treasurer Britt's account (T. of R. pg. 123), was opened on January 15, 1913, with a deposit of $9,-974.76, and when the Bank closed its doors on September 17, 1914, he had a balance on deposit of $12,-823.58.

When Treasurer Marr went out of office as County Treasurer on January 8, 1913, he took from the Bank a Demand Certificate No. 1098, for $9,-974.76. He never cashed this certificate, or actually drew any money out of the Bank.

When Treasurer Britt opened his account on Jan-

uary 15, 1913, he deposited this same certificate as the commencement of his account with the Bank (T. of R. pg. 69 and fol.) His balance ranged up to $15,000 and was $12,923.58 when the Bank failed (Exhibit 17, T. of R. pg. 123).

The Treasurer of Thurston County, when the Bank failed, demanded that plaintiff pay its liability on its bond amounting to $4,327.87. Plaintiff made demand on defendants to pay this which they refused to do, and plaintiff, on December 30, 1914, paid to the Treasurer of Thurston County its liability amounting to $4,327.87. Plaintiff paid for investigating its liability an expense account of $14.00.

Plaintiff on April 21, 1915, received a dividend from Receiver Langley, amounting to $855.82 which was to be credited on the above payment made by it to the County Treasurer. No other payment has been made to plaintiff, and if it is entitled to recover against the defendants its judgment should be for $4,327.87 together with the $14.00 expense paid, with 6% per annum interest from December 30, 1914, to April 21, 1915, on which date the dividend of $855.82 was paid. Deducting this from the above principal and interest would leave a balance of $3,564,23, which would draw 6% per annum interest from April 21, 1915, until paid which would be the amount of the judgment and the

costs to follow (T. of R. pg. 74 and fol.) Treasurer Britt died prior to the commencement of this action.

At the conclusion of plaintiff's testimony which shows the foregoing facts, the defendants moved the Court for a non-suit and a dismissal of plaintiff's action on the grounds that plaintiff had failed to prove a cause of action and that its proof showed affirmatively that plaintiff was not entitled to recover (T. of R. pg. 76).

The Court granted the motion on the ground that the original bond, dated June 22, 1911, only secured money deposited by or for Treasurer Marr, that the indemnity agreement indemnified plaintiff against loss by reason of this bond, that Section FIFTH of the indemnity agreement (T. of R. pg. 111), did not authorize the substitution of the bond dated June 22, 1914, but would only authorize changes in the original instrument such as by interlineation, or details on the face of the original bond to make it more complete or full, but not changes that would make it different or contrary to its main purpose, that Section FIFTH should be given a more narrow meaning than its words might otherwise convey (T. of R. pg. 76 and fol.)

The Court then discharged the jury and directed defendants to prepare a judgment according to its

ruling. Plaintiff's exceptions were taken and allowed to the ruling and to the discharge of the jury (T. of R. pg. 80).

On February 5, 1917, judgment was entered dismissing plaintiff's action with costs to defendants to which exception was allowed plaintiff (T. of R. pg. 50).

Plaintiff filed its petition for Writ of Error and filed its Assignment of Errors to reverse said judgment, and to cause the District Court to be directed to enter a judgment in favor of plaintiff and against the defendants for the amount above stated, or if such judgment is not proper, then that the District Court be directed to grant a new trial and proceed with the action (T. of R. pg. 139 and following).

The Writ of Error was regularly allowed and the proper bond on the writ approved by the Court was filed, and the Writ of Error and Citation thereon issued (T. of R. pgs. 142-143-148-151).

ASSIGNMENT OF ERRORS.

(T. of R. pg. 140 and following.)

Plaintiff claims that the Court erred as follows:

I.

"In refusing to allow witness Allen to answer the following question: 'Q. I will ask you, Mr. Allen, what was the purpose of obtaining the release of that first bond?'

II.

In refusing to allow witness Allen to answer the following question: 'Q. I will ask you, Mr. Allen, if between the expiration of the first bond of June 22d, 1911, and the coming into effect of the bond of June 22d, 1914, was there any intervening period at which time the National Surety Company would not have been bound?'

III.

In refusing to allow plaintiff to show that the bond of June 22d, 1914, was a substitution for the bond of June 22, 1911.

IV.

In refusing to allow plaintiff to show that it is the universal rule to require an application from the applicant for a depository bond.

V.

In admitting in evidence Defendants' Exhibit 'E'.

VI.

In admitting in evidence Defendants' Exhibit 'F'.

VII.

In sustaining defendants' motion for non-suit and dismissal of plaintiff's action, interposed when plaintiff rested its case, said motion reading as follows:

'MR. PETERSON.—If the Court please, the defendants at this time jointly and severally move the Court for a judgment of non-suit and dismissal of plaintiff's action and for costs on the ground and for the reason that the plaintiff has failed to establish a cause of action against the defendants or either of them, and for the further reason and upon the further ground that the proofs offered by plaintiff show affirmatively that it is not entitled to recover against the defendants or either of them.'

VIII.

In discharging the jury from further considering the case.

IX.

In entering judgment in favor of defendants and against plaintiff, said judgment being entered February 5th, 1917."

ARGUMENT.

The assignments I to VI are of no great importance in view of the Court's decision.

As assignments VII to IX all involve the same error, that is the dismissal of the action, we will discuss them together.

Did plaintiff submit evidence sufficient to entitle it to have the case submitted to the jury for its verdict?

Situation of the Parties.

The Bank of Tenino wanted to be a depository of County funds, and to become such it required a surety bond. The ownership of the Bank was almost solely in the defendants who were its officers and controlled its business.

The Bank signing by two of the defendants, Blumauer, its President, and Hays, its Cashier, made a written application to plaintiff for such bond. Plaintiff agreed to write the bond provided the defendants, who practically owned the Bank and solely had charge of its affairs, would indemnify it against loss.

The bond was given and the defendants executed and delivered to plaintiff the indemnity agreement. This was done in order that the Bank could become a depository of County funds and for the purpose of securing the County against loss of any money of the County that should be deposited in the Bank by the County Treasurers. It was in no sense a personal

matter of Marr's but a public matter securing public funds belonging to the County and deposited by whomsoever might be County Treasurer. This is not only true in fact, but was so acted upon by defendants as officers of the Bank, for after Marr was succeeded by Britt as County Treasurer, the same bond was continued in force and accepted by the County by merely the payment of an annual premium.

This indemnity agreement signed by the defendants recites that the defendants requested plaintiff to write the bond in favor—not of Marr as County Treasurer—but in favor of the *Treasurer of Thurston County, Wash.,* to cover—not deposits of Marr—but deposits of the *said Treasurer.*

The agreement recites that the bond was or was about to be signed by the plaintiff upon the security and indemnity contained in the indemnity agreement, that the consideration for their signing the indemnity agreement was the premises and One Dollar and they agreed as follows:

FIRST. The indemnitors agree to pay plaintiff $25.00 for its *accommodation* to them and to pay said sum *annually in advance* on June 22, of each and every year during the time plaintiff should continue liable and until plaintiff should be discharged from liability

on the bond and on all matters arising therefrom and until *"there shall have been furnished to the Company at its principal office in the City of New York, due and satisfactory proof by evidence legally competent of such discharge and release* (T. of R. pg. 98).

SECOND. The indemnitors agree to at all times indemnify the plaintiff against all liability which it might sustain in consequence of having executed the bond.

FOURTH. The plaintiff could take necessary steps to be released from the bond or from *"any other instrument within the meaning of Section Fifth hereof.*

"FIFTH. That no act or omission of the Company in modifying, amending, limiting or extending the instrument so executed by the Company shall in any wise affect our liability hereunder, nor shall we nor any of us be released from this obligation by reason thereof; *and we agree that the company may alter, change or modify, amend, limit or extend said instrument and may execute renewal thereof or other and new obligation in its place or in lieu thereof, and without notice to us, notice being expressly waived,* and in any such case we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, amended, limited

or extended instrument, or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein." (T. of R. pg. 101).

SEVENTH. The indemnity agreement binds the indemnitors jointly and severally, and their heirs the indemnitors jointly and severally, and their hears and assigns *"until the Company shall have executed a release under its corporate seal, attested by the signatures of its officers proper for the purpose."* (T. of R. pg. 102).

"EIGHTH. That these covenants as also all collateral securities or indemnity, if any, at any time deposited with or available to the Company concerning any bond or undertaking executed for or at the instance of us, or any of us, shall, at the option of the Company, be available in its behalf and for its benefit and relief as well concerning any or all former or subsequent bonds or undertakings executed for us, or at the instance of us, or any of us, as concerning the bond or undertaking such covenants, collateral securities or indemnity shall have been made, deposited or given." (T. of R. pg. 102).

Upon the bond being approved by the proper

County Officials and filed with the County Clerk, the Bank became a depository for County funds which should come into the hands of the County Treasurer. Robert Marr was then County Treasurer and he commenced depositing County moneys in the Bank and continued to do so during his term of office which expired on January 8, 1913.

The first premium carried the bond to June 22, 1912, at which time the Bank being still practically owned by the defendants and under their sole management paid the annual premium which continued the bond to June 22, 1913, or beyond Marr's term of office. No new bond was demanded or taken or no new indemnity agreement was delivered but the old bond was thus continued beyond Marr's term to June 22, 1913, and the indemnity agreement was held by the plaintiff.

The defendants do not contend that the indemnity agreement terminated at the end of the first year or June 22, 1912.

In their answer they claim:

FIRST. That the bond expired on January 8, 1913, when Marr's term ended.

SECOND. That it expired on June 22, 1914, when the substituted bond was taken and the old bond

released, though it is not claimed that on either of these dates there was in fact any release of liability as in Section First of the indemnity agreement required, or that the plaintiff had released the indemnitors as in Section Seventh of the indemnity agreement required, nor in fact did the indemnitors claim or assert that they had been released from the indemnity agreement until after the Bank failed.

Defendants in the first affirmative defense, paragraph III of the answer of Campbell and wife (T. of R. pg. 28), and in paragraph III of the answer of Mentzer and wife, and Eva Copping (T. of R. pg. 37), affirmatively allege, "That the term of office of the said Robert Marr as County Treasurer of Thurston County, Washington, expired and terminated under the laws of the State of Washington, on the 8th day of January, A. D. 1913, and the said depository bond, Exhibit "A", by its terms and conditions also expired and terminated on the said 8th day of January, A. D. 1913," and in paragraph VI of the Second affirmative defense in said answers (T. of R. pg. 30 & 41), affirmatively allege "That on or about the 29th day of May, A. D. 1914, one W. H. Britt, the duly elected, qualified and acting Treasurer of Thurston County, Washington, and successor of the said Robert Marr, former treasurer, fully released, cancelled and dis-

charged the said depository bond Exhibit "A" and fully released and relieved and discharged the plaintiff of all liability thereunder, and surrendered up and delivered the said bond to the plaintiff, and the defendant was thenceforth and thereafter and at all times since has been fully discharged and relieved of all liability thereon or responsibility thereunder."

Defendants hence are making no contention in regard to the payment of the second premium on June 22, 1912, which carried the life of the bond to June 22, 1913, and over the expiration of Marr's term as County Treasurer and into Britt's term for some five months. Defendants in the second affirmative defense admit that the bond ran until Britt gave the release on May 29, 1914, *thus admitting that the bond was not personal to Marr, but could be and was released by his successor, Britt, that it did not expire with Marr's term but was in force during Britt's term.* This defense is an admission that the renewals on June 22, 1912, and on June 22, 1913, were valid and continued the bond and the indemnity agreement in force.

When Marr went out of office he took a Demand Certificate for $9,974.76 and turned this over to his successor, Britt, who opened his account with it with the Bank.

On June 22, 1913, and after Marr's term had expired and Britt had succeeded him as County Treasurer, which took place on June 8, 1913, a third annual premium was due in order to extend the bond for another year, or until June 22, 1914. The plaintiff billed the Bank for the premium which was paid, and the receipt with a letter from indemnitor Hays to Britt (T. of R. pg. 57) was filed with the County Clerk.

This letter to Treasurer Britt, dated June 13, 1913, written in behalf of the Bank and of the indemnitors and by one of them states that this premium payment *continues the bond in force for one year.* This letter became a public document and it must be presumed that the indemnitors who were the Bank officials had knowledge of it especially as in the indemnity agreement they had agreed to pay the premium and had agreed to keep the plaintiff indemnified. By this payment the Bank continued as a depository receiving County moneys, of which the indemnitors being practically the sole owners and in charge of the Bank's business, are charged with knowledge and of which they receive the benefit.

No new bond was taken but the original bond was continued in force to June 22, 1914. No new indemnity agreement was delivered but the indemnity agree-

ment given with the bond was still held by the plaintiff. The indemnitors did not then suggest that their indemnity agreement was terminated or that they should be released. They had agreed to keep the plaintiff indemnified and to be bound *until the plaintiff should have executed a release to them under its corporate seal and the signatures of its officers.*

There can be no question that in the minds of all parties the original bond was then continued and any loss to plaintiff was protected by the indemnity agreement. The indemnitors can not presume to have intended a breach of their agreement to keep the plaintiff indemnified, especially without in some manner notifying the plaintiff to that effect.

This we believe to be a complete answer to the first defense wherein it is claimed that the bond and indemnity agreement terminated with the expiration of Marr's term, January 8, 1913. After that date, to-wit, on June 22, 1913, the bond was certainly continued in force for the benefit of the indemnitors until June 22, 1914, and no other indemnity agreement was given nor was the indemnity agreement released, but was still in the hands of the plaintiff. By their own acts they continued plaintiff's liability on the bond and likewise continued their agreement to indemnify plaintiff.

The second defense, *which in fact negatives the first defense,* states that Treasurer Britt released the original bond on May 29, 1914, and thereby defendants became released from the indemnity agreement. While the release is dated May 29, 1914, yet it states it was not to be in effect until June 22, 1914, on which date the substituted bond would become operative.

The Court must now determine what actually took place just prior to June 22, 1914, the date to which the last premium had been paid. What did the parties intend in view of the stipulations contained in the indemnity agreement?

The Bank was still practically owned by defendants and under their exclusive control.

The indemnity agreement was based on a valid consideration. It recites that it is in consideration of the premises and of the sum of One Dollar, and in Section First the indemnitors agree to pay the premium annually, which is plaintiff's compensation for the *accommodation afforded them.* They were stockholders and officers and it was to their financial interest to keep the Bank a public depository. The situation on June 22, 1914, was the same as on June 22,

1913. Britt and not Marr was the County Treasurer at each time.

The original bond was continued with Britt's consent on June 22, 1913, by the indemnitors or the Bank simply paying the annual premium as the indemnitors in Section First had agreed to do. They planned to do the same thing on June 22, 1914, that is simply pay the annual premium which would continue the bond for another year. On May 22, 1914, the Bank sent plaintiff the annual premium to continue the bond for an additional year (Exhibit 4, T. of R. pg. 106), and in the letter accompanying the draft it was suggested that Britt had suceeded Marr as County Treasurer and if necessary, that an endorsement would be made to that effect, although the fact is that Britt had succeeded Marr on January 8, 1913, and one renewal had been made while he was in office.

On May 23, 1914, plaintiff sent the Bank a receipt for the premium continuing the bond for an additional year and stated that if Marr's term had expired and Britt had been elected to succeed him, a new bond should be sent and requested to be advised (Exhibit 3, T. of R. pg. 105).

On May 25, 1914, the Bank in answer, wrote the plaintiff as follows (Exhibit 5, T. of R. pg. 107):

"Geo. W. Allen & Co.,
Alaska Bldg.,
Seattle, Wash.

My Dear George:

Your favor of the 23rd inst. enclosing receipt for annual premium has been received and in connection therewith beg to state that Mr. W. H. Britt was elected to succeed Mr. Robert Marr at the election two years ago, hence I imagine that it is necessary for you to issue a new bond, which I trust you will do and forward to us, however, the same bond has been renewed once or twice since Mr. Britt assumed office.

Thanking you for your attention in this matter, I am

Very truly yours,

STATE BANK OF TENINO,
W. Dean Hays, President."

On May 28, 1914, the plaintiff sent a new bond, dated June 22, 1914, and a letter (Exhibit 6, T. of R. pg. 108), as follows:

"Mr. W. Dean Hays, Vice-President,
State Bank of Tenino,
Tenino, Wash.

My Dear Dean:

Acknowledging your esteemed favor of the 25th instant, we enclose herewith new bond duly executed in favor of W. H. Britt, County Treasurer of Thurston County, Washington, effective June 22d, 1914. We think it is best that a new bond be filed as of the anniversary date of the former bond, and we will therefore, require new application signed by your good institution, which kindly let us have, together with copy of your latest financial statement, by return mail. It will also be necessary that the enclosed

release be signed by the Treasurer covering the former bond, as the same by its terms is continuous, and we must have this release to enable our home office to relieve our account of future premiums.

Thanking you to let us have the application and release promptly, and with kindest regards, I remain,

Very truly yours,
GEO. W. ALLEN,
Manager."

This bond was delivered by the Bank to the Treasurer on May 29, 1914, with a letter (Exhibit 9, T. of R. pg. 111), as follows:

"Mr. W. H. Britt, Treas.,
Olympia, Washington.

My Dear Mr. Britt:

You will herewith please find Depository Bond of the National Surety Company of New York in your favor for $5000.00 maturing June 22, 1915, to take *the place of* the one heretofore issued to Robert Marr as Treasurer.

You will also find two blank releases for the former bond which you will kindly sign and return to us.

Thanking you for your attention to this matter and trusting that you will find everything satisfactory, I am

Very truly yours,
STATE BANK OF TENINO,
W. Dean Hays,
V. President."

At the time of receiving the new bond Treasurer Britt gave the Bank for the Surety Company a release of the original bond to be effective from and after June 22, 1914 (T. of R. pg. 116, Exhibit 11).

During these negotiations there was no suggestions that the indemnity agreement would become void. No one had any such intention. No new indemnity agreement was given. It would not be in keeping with their agreement to at all times keep plaintiff indemnified to claim the indemnity agreement was then terminated nor with their agreement to be bound until the plaintiff released them from the indemnity agreement.

The situation was in no manner changed. The defendants still wanted their Bank to be a public depository and qualified to receive County funds, the liability was still limited to $5,000.00. The whole correspondence shows that plaintiff's liability continued uninterrupted and that one bond was substituted for the other.

It would certainly be unconscionable and unjust for the indemnitor to arrange for the plaintiff's liability to continue, they secretly intending that such continued liability would not be indemnified, especially in view of their agreement to pay the premium annually, and to at all times keep the plaintiff indemnified. The indemnitors did not ask for nor did plaintiff give them a release.

No one ever contemplated that the indemnitors

were released, and they made no such claim until after the Bank failed and they were called upon to pay. Certainly the purpose of the release clause in the agreement could have been for no other reason. If the plaintiff desired the indemnity agreement in the first place it had the right to rely upon it fully. They received the benefit of the substituted bond from June 22, 1914, and their Bank continued as a public depository receiving County moneys.

In their indemnity agreement, Section Fifth, they stipulated that no action of the plaintiff in extending the bond should in any wise affect the liability on the indemnity agreement or release them therefrom; that the plaintiff could change, modify, and extend the bond, could renew the same or give a new obligation in its place without notice to them and they would be liable to plaintiff as fully and to the same extent on account of such changed, modified or extended instrument or such renewals thereof of other or new obligations in place thereof, *whenever and as often as made* as fully as if such instrument was described at length in the indemnity agreement they were then executing (T. of R. pg. 101).

Section Four of the indemnity agreement provides for plaintiff's taking steps to procure its release from

liability on any instrument within the meaning of Section Fifth (T. of R. pg. 100).

Section Eighth provides that the covenants in the indemnity agreement should be available to plaintiff as well concerning any subsequent bonds executed for them or *at the instance of any of them* as concerning this original bond.

This new or substituted bond was executed on the request of Hays, who was one of them and was signed by Blumauer as President, and Hays as Cashier, both of whom were indemnitors and defendants in this action (Exhibit 10, T. of R. pg. 112).

The trial Court seems to have decided this case as though the suit was on the bond. This suit is on the indemnity agreement and the bonds were put in evidence to prove the plaintiff's legal liability by reason of which it paid the County.

The question to be determined is whether the indemnity agreement was still in force and whether it indemnified the plaintiff against this loss. Did these indemnitors who were stockholders and officers of the Bank, in their indemnity agreement intend to cover, and did they in fact cover renewals and substituted bonds? They said so in the most positive terms. After stipulating for renewals and substitutions they said

"we and each of us shall be liable to the Company as fully and to the same extent on account of any such renewals thereof or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein."

How the trial Court could express a doubt as to the right to make more than one renewal is difficult to determine in view of the language "any such renewals" and "whenever and as often as made." It seems clear that all the renewals carried with them the continued liability of the indemnitors. Did the indemnitors in their indemnity agreement cover new or substituted bonds in place of the original? That is, did the indemnity agreement cover such a transaction as occurred on June 22, 1914? What, in fact, was this transaction? It would seem to be plain from the correspondence.

These indemnitors agreed to pay an annual premium. This premium was actually sent and paid for continuing the original bond and in performance of their covenants to pay the annual premium. The plaintiff sent a receipt for the premium. It was after this that it was thought best to substitute a new bond for the original bond and a new bond was sent in the same amount but no new premium paid.

The Bank, acting through indemnitor Hays, delivered this bond to the County Treasurer *to take the place of the former bond issued to Marr* ("in lieu of") as Treasurer, and requested Treasurer Britt to release the former bond (Exhibit 9, T. of R. pg. 111). Britt, though the former bond ran to Marr as Treasurer, released it to be effective June 22, 1914, when the new bond which took its place was dated. No other premium was paid by the indemnitors but the premium sent by the Bank, acting through indemnitor Hays, to continue the original bond paid for this renewal of the substituted bond.

When all technicalities and verbiage are brushed aside, the parties simply substituted a new bond running to Britt as County Treasurer, successor to Marr, in place of the bond that ran to Marr as Treasurer. Plaintiff was not released of liability but its liability continued as theretofore and was indemnified by the indemnity agreement. *It was in fact the extension of the liability for an additional year.* This was clearly covered by the express covenants in the indemnity agreement. The indemnitors agreed to be bound by any extensions or substitutions of the bond, that the Company could execute renewals or other or new obligations in the place of the bond without notice to them and they were to be liable to the Company on

account of any such renewals or other or new obligations given in place of the bond *whenever and as often made* as fully as if such new obligation was described at length in the indemnity agreement.

This bond
~~Thus band~~ took the place of the former. Both bonds were not in force at the same time but on the expiration and release of the original bond the substituted bond became operative. It was not added to but was given in the place or in lieu of the former bond.

Language could not be plainer. The whole correspondence shows it. On May 22, 1914, the Bank, acting through indemnitor Hays, sends the annual premium and states it is in payment for *renewal* of the depositary bond."

On May 23, 1914, the Bank, acting through indemnitor Hays, writes the plaintiff acknowledging receiving receipt for the *annual premium.*

On May 26, 1914, Treasurer Britt acknowledges receipt of the *Renewal Certificate,* and suggests it would be much better to have a new bond running to him as County Treasurer as the old bond ran to Marr as County Treasurer.

On May 29, 1914, the Bank, acting through indemnitor Hays, delivered the new bond and wrote

Treasurer Britt that it is "*to take the place of* the one heretofore issued to Robert Marr as Treasurer" and enclosed blank release of the original bond to be signed and returned. The new bond was executed by the Bank, acting through indemnitors Blumauer and Hays.

Surely the trial Court was not justified in holding as a matter of law that the new bond did not and was not intended to take the place or be in lieu of the original bond. As this evidence was not disputed the trial Court should have held as a matter of law the exact contrary, or at least, should have submitted this matter to the jury under proper instructions.

The indemnitors covenanted for renewals, for changes, for extensions, and for the substitution of other or new obligations in place or in lieu of the original bond and that they would be bound until the plaintiff should execute a release under its seal and the signature of its proper officers.

No release had ever been given or asked by the indemnitors but with their knowledge, or at least the knowledge of Hays and Blumauer, a renewal or extension by means of another and new obligation had been given and the indemnity agreement left unreleased and with the plaintiff in full force and effect.

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The indemnitors are compensated sureties or guarantors. The indemnity agreement recites that they have requested the plaintiff to sign the bond, that it is in consideration of the premises and One Dollar, and that they will pay the premium annually as compensation to the plaintiff for the accommodation afforded them by the plaintiff in executing the bond. The evidence shows that at the time and during all the transactions the indemnitors owned all but 12 shares of the capital stock of the Bank.

The rule of strict construction, if there were room for construing the indemnity agreement, does not apply. It must be remembered that the indemnitors were not voluntary sureties.

Cowles vs. U. S. T. & G. Co., 32 Wash. pg. 120 (Opin. pg. 125).

Costello vs. Bridges, 81 Wash. pg. 192 (Opin. pg. 204).

Mamerow vs. National Lead Co., 99 Am. St. Reps. pg. 196.

The indemnity was a continuing one as long as the plaintiff was obligated for the deposits of County moneys in the Bank whether by reason of the original bond or any extended, renewed, altered, changed, modi-

fied or amended bonds or other or new obligations in place thereof.

Lowe vs. Beckwith, 58 Am. Dec. pg. 659.

Gates vs. McKee, 64 Am. Dec. pg. 545.

Michigan State Bank vs. Peck, 65 Am. Dec. pg. 234.

First Commercial Bank vs. Talbert, 50 Am. St. Reps. pg. 385.

Strawbridge vs. Baltimore Ry. Company, 74 Am. Dec. pg. 541.

Anderson vs. Langdon, 4th L. Ed. (U. S.) pg. 42.

The bond which the indemnity agreement was executed to secure, was solely for the benefit of the County ~~Company~~, whether deposits were made by Treasurer Marr or his successor in office, and the indemnitors agreed that such bond could be changed, extended, renewed or a new bond given. This bond was extended or renewed on June 22, 1912, for one year or until June 22, 1913. Marr as Treasurer was succeeded by Britt as Treasurer on January 8, 1913. If the Bank had failed in February, 1913, surely the County, through Britt, its then Treasurer and successor to Marr, could have held the plaintiff and the plaintiff could have held the indemnitors.

The same bond was again extended or renewed on June 22, 1913, for one year or until June 22, 1914,

and certainly a failure of the Bank during that period would obligate the plaintiff to respond on the bond and the indemnitors to respond to plaintiff. If it could be extended or renewed, certainly a new bond could be furnished in its place for to this the indemnitors had agreed.

John Tyler, etc., vs. John H. Hand, et al., 12 L. Ed. (U. S.) page 824.

In the above case the bond ran to Martin Van Buren, President of the United States, and his successor in office. It was held that President Tyler could sue on the bond.

The bond in the case at bar was given in order to comply with the statute so that the Bank, practically owned by the indemnitors, could be a depository of county funds. While it did not in express terms run to Marr's successor in office, yet the application for the bond designated the obligee to be the Treasurer of Thurston County. The indemnity agreement nowhere mentions Marr by name but recites that the signers have requested plaintiff to execute a $5,000.00 bond in favor of the *Treasurer of Thurston County* and they agree to pay an annual premium until plaintiff should be discharged from liability and that they would be bound on any extensions or renewals or other

new bond as though the same were set forth in the agreement. The renewal or new bond is as much for their interest as the original bond for they, as owners of the Bank, would receive the benefit of having the Bank continue as a depository of County funds.

U. S. vs. Bailey, 178 Fed. pg. 302.

In the above case a bond binding the Principal and Surety and their successors and assigns was sued upon to recover damages caused by the receiver of the principal in the bond and recovery was allowed.

American Surety Co. vs. Campbell, 138 Fed. Rep. pg. 531.

In the above case suit by the corporation after the termination of receivership on a bond given to the receiver his successors and assigns was maintained.

The purpose of the bond was to constitute the Bank a depository of County funds and to secure to the County a return of deposits made by its Treasurer and this was secured to the plaintiff by the indemnity agreement.

The personnel of the County Treasurer was of no concern to the indemnitors. It was not the Treasurer's honesty or faithfulness that they were insuring the plaintiff against but the honesty, faithfulness and financial ability of their Bank, an institution that

they owned and managed. It would be the same money, that is County money, whether deposited in the Bank by Marr as Treasurer, or by Britt as Treasurer. The Bank, or in fact the indemnitors as owners and managers of the Bank, would handle it and be responsible to the County no matter what might be the name of the Treasurer who made the deposits.

They were indemnifying the plaintiff against their own institution and not against the Treasurer, be he Marr or Britt.

There can be no question but that this was what was intended and was the interpretation placed upon the transaction as is conclusively shown by the subsequent renewals and the correspondence that took place at the time the substituted bond was filed. The personnel of the owners and officers of the Bank for whose acts the indemnity agreement was given was at no time changed.

If they were willing to indemnify against loss in their Bank of the deposits by Marr as County Treasurer, there was not and could not be any reason for not indemnifying against loss in the same Bank of the deposits by Britt as County Treasurer, especially in view of the fact that they agreed to pay an annual premium until the plaintiff was released, to at all times

keep plaintiff indemnified, and be bound for any renewals or substitutions until plaintiff released them.

The successor in office of a sheriff may sell under a levy made by a former sheriff.

Lewis vs. Bartlett, 12 Wash. pg. 212.

This bond was given to a County official pursuant to the statute regarding depositaries and inures to his successors.

State vs. Peterson, 114 N. W. pg. 828.

Faurot vs. State, 11 N. E. pg. 472.

Murfree on Official Bonds, paragraph 38.

The County was the real party for whose benefit the bond was taken, and could have maintained an action in its own name.

People vs. Bankers' Surety Co., 122 N. W. pg. 350.

Placer County vs. Dickerson, 45 Cal. pg. 12.

Buhrer vs. Baldwin, 100 N. W. pg. 468.

Board of Commissioners vs. Bank, 77 N. W. pg. 815.

State vs. Foster, 38 Pac. pg. 926.

McClure vs. County Commissioners, 19 Cal. pg. 122.

State vs. McFetridge, 20 L. R. A. pg. 223.

Jarboe vs. Shirely, 59 S. W. pg. 328.

This was a community liability to the plaintiff and the wives are proper parties. This point was not raised by defendants in trial court.

Horton vs. Donohoe Kelly Banking Co., 15 Wash. pg. 399.

Way vs. Lyric Theatre Company, 79 Wash. 275.

This action, as already stated, is on the indemnity agreement and it is this instrument that must be construed. The indemnitors having agreed that the bond could be without notice to them, altered, amended, modified, changed, extended, renewed, or a new bond given in its place, the sole question to be decided is whether the extensions and renewals and the substitution of the new bond were within the terms of the agreement as contemplated at the time by the plaintiff and the indemnitors.

The indemnitors were almost the entire owners of the Bank and with full control of its business. They knew that the bond as written was for one year for which they paid a year's premium and agreed to annually pay such premium on June 22nd, of each year during plaintiff's liability on the bond or on any extension, renewal or new bond given in its place. They wanted their Bank to be a depository of County funds not for one year but continuously. They knew,

as owners of almost all the capital stock, that they could continue in control of the Bank. They knew when the bond was given that under the statute, Marr's term would expire on January 8, 1913 (Rem. & Bal. Code, Sec. 3860-3937).

What did the indemnitors intend by their agreement that the bond could be changed, altered, extended and renewed and a new bond substituted whenever and as often as made?

They could cease to be a depository, cancel the bond and not pay a renewal premium at any time as they had full control of the Bank. It was no concern to them or any change or increase of liability, whether Marr or his successor made deposits. It was not against Marr's acts or those of his successor that they were indemnifying the plaintiff, but against the acts of their own Bank. The personnel of the County Treasurer was in no way material, nor did it enter into the transaction which induced them to indemnify plaintiff against the acts of their Bank in accepting the County deposits, whether made by Marr or his successor.

The entire transaction, correspondence and relation of the indemnitors to the Bank show, it seems

to us conclusively, that just such a course as was pursued was contemplated and agreed to.

They, as indemnitors and officers of the Bank, knew that their indemnity agreement had not been released but was, during all such renewals and the substitution of the new bond, still held by the plaintiff, they having agreed to at all times keep plaintiff indemnified and to be bound until the plaintiff gave them a written release under its corporate seal and the signature of its officers. When the circumstances of the parties and the ends desired to be accomplished are given full consideration, it seems conclusive to us that such renewals and substitution as took place were intended to be and were covered by the stipulations in the indemnity agreement.

Plaintiff acting in good faith, relying upon its indemnity agreement, the indemnitors having received the benefit of the renewals and the substituted bond in having their Bank continued as a depository of County moneys, knowing that no new indemnity agreement had been given, that their agreement had not been released but was still held by plaintiff.

After the Bank failed and plaintiff was required to pay deposits procured by defendants by reason of the plaintiff's bond, it is too late for defendants to

claim that plaintiff is not protected by their indemnity agreement and has not been kept indemnified, as they had agreed to do, they having received the benefit and having made no such claim when such renewals were made and said substituted bond given.

We submit that the trial Court committed error in taking the case from the jury and disimssing the action.

We respectfully request that this Court reverse the judgment and direct the trial Court to enter a judgment in favor of plaintiff and against the defendants for $4,327.88 with 6% per annum interest thereon from December 30, 1914 (less $855.83 paid as dividend by the receiver on April 21st, 1915), together with $14.00 as expenses in investigating liability, with costs to plaintiff, or if such judgment is not proper then that the District Court be directed to grant a new trial and proceed with the action.

Respectfully submitted,

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